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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1995

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In 1976, this Court said that a government may require a police officer to salute the flag while in uniform. *Kelley v. Johnson*, 425 U.S. 238, 245-46 (1976). In 1996, Respondents and amici suggest that a government may not require the same police officer to speak English on the job.[1]

In 500 pages of coordinated briefing by Respondents and amici, perhaps what is most telling is not the errors, distortions and misconceptions, but what is not said. There are no references to Judge Fernandez's or any other dissent. There are no references to government's rights to set policy and few references to government's rights to speak or promote a particular policy. There is no recognition of the nondiscriminatory purposes and substantial state interests enunciated in recent congressional consideration of Official English[2] legislation.

There is no recognition that government programs to preserve languages and cultures are policy choices, not constitutional mandates, and certainly no mention of the numerous governmental failures in providing language

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[1]Nor are police the only uniformed government employees affected by this case: on August 1, 1996, the United States House of Representatives considered an amendment to prohibit the government from assigning combat duty to members of the armed forces who don't speak English. H.Rep. 104-734, 104th Cong. 2d Sess., 3-4 (1996) (Amendment by Rep. Serrano); CONG. REC. (daily ed.) Aug. 1, 1996, H9730 (Remarks of Del. Romero-Barceló)("And how many of those soldiers that were defending the Nation died because maybe they did not understand the orders?").

[2]Article XXVIII is an "Official English" provision, not an "English-only" law. Article XXVIII affects only government speech, and not even all government speech. It applies only to actions which bind the government. CONG. REC. (daily ed.) Aug. 1, 1996, H9763 (Remarks of Rep. Seastrand). In contrast, "an English-only bill . . . would apply not only to the Government but to private businesses, churches, neighborhoods, and homes." *Id.*, H9766 (Remarks of Rep. Cunningham).

"assistance." And the historical analyses offered by Respondents and amici never mention that every decision to use a language other than English has been a considered choice by government, not a mandate from the First Amendment.

The lower court decisions, which similarly ignore all of these points, should be reversed.

I. Respondents and Amici Ignore Both the Government Speech Doctrine and the Rights of the State to Set Policy.

"Kelly Yniguez just wanted to do her job." Brief for Respondent Maria-Kelly F. Yniguez ("Yniguez Opp."), 1. Her job was to protect the public fisc by settling malpractice claims of up to $10,000. J.A. 84.

But how would Arizona know if she **was** doing her job, since her supervisors and auditors could not read the settlement releases she was writing? J.A. 88. Trust me, she suggested. J.A. 87-88. Trust, but verify, responded the State. J.A. 88.

If Yniguez had said at her job interview, "I'll decide for myself which State policies I'll obey," she would not have been hired. The situation was no different once Yniguez got the job. She has "no special constitutional right to a voice in the making of policy by [her] government employer." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285-86 (1984); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-66 (1979)(same); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n. 4 (1990)(that government uses public employment to further its interests in the structure and functioning of society as a whole does not render those interests employment-related).

No reference to these cases can be found in Respondents' and amici's briefs. Yet these briefs ask for the power to set or ignore State policy, based solely on public employees' rights, rights of claimants for government services, and a perceived need to preserve languages and cultures.

Similarly, only passing references can be found to the "government speech" cases, such as *Rosenberger v. Rector and Visitors of Univ. of Virginia*, __ U.S. __, 115 S.Ct. 2510, 2518-19 (1995)(state may regulate the content of expression when it is the speaker), *Capital Square Review & Advisory Bd v. Pinette*, __ U.S. __, 115 S.Ct. 2440, 2449 (1995)(government runs no risk of suppressing free speech when it restrains its own speech), and *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)(city may restrict signs on city buses to avoid "lurking doubts about favoritism").[3] Under Respondents' and amici's interpretation, for example, government **does** run a risk of suppressing free speech when it chooses to speak in English. Yet *Capital Square* is not mentioned.

It is as if the State has no right to control its own expression, and, as shown in Petitioners' Opening Brief on the merits, Pp. 20-32, that position is contrary to this Court's decisions. "The fault lies in the rule's central premise – the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government." Appendix to Petition for Certiorari ("App."), 89a (Kozinski, J., dissenting). The lower court's decision must be reversed.

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[3] *See also*, Transcript of argument in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, No. 94-1654, Nov. 28, 1995:

QUESTION: The Government cannot possibly use its authority, its contracting authority to foster any policies or ideas that it thinks are desirable?

MS. BRINKMANN [for the United States]: If the contract is to communicate the Government's speech, certainly. Pp. 52-53.

MS. BRINKMANN: [O]ne of the differences in the Government interests between the employee situation and the contractor situation is whether the speaker's speech is attributed to the Government. *Id.*, 54.

II. This Is A Policy Debate About How Government Should Respond to the Needs of Immigrants and Society.

Respondents and amici claim that Official English statutes are divisive and discriminatory, serve no legitimate government interests and are predicated on fear of immigrants. In fact, Article XXVIII, like all modern Official English enactments, is predicated on a belief that recent **government** language policies hurt immigrants and American society alike.

A. Official English Statutes Protect Important Non-Discriminatory State Interests.

A recent congressional debate demonstrates both the nondiscriminatory purpose of Official English enactments and the vital state interests they serve.[4] On August 1, 1996, the U.S. House of Representatives passed H.R. 123, the Bill Emerson English Language Empowerment Act of 1996, by a vote of 259-169. CONG. REC. (daily ed.), Aug. 1, 1996, H9771-72. Rep. Linder, floor manager for the Rule which crafted H.R. 123 from disparate legislation,[5] summed up the basic rationale:

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[4]CONG. REC. (daily ed.) Aug. 1, 1996, Pp. H9725-H9772, H9726 (Remarks of Rep. Linder: "Mr. Speaker, the English Language Empowerment Act of 1996 is designed to empower a new generation of immigrants. . . This bill assures that we have a uniform government policy that does not undercut incentives to learn English and is consistent with established immigration policy."), H9731 (Remarks of Rep. Solomon: "[I]f the Government does not remove the impediments to assuring that these immigrants receive the keys to opportunity here, then I am afraid they will remain in what the New York Times called a bilingual prison."), H9736 (Remarks of Rep. Kingston, speaking in English, French, Italian and Japanese: "Nations need a common language ").

[5]The bill, as passed by the House, combined the late Rep. Emerson's Language of Government Act, declaring English the official language of the federal government, with the Bilingual Voting Requirements Repeal Act of 1996, H.R. 351, which would repeal the federal mandate for multilingual

(continued...)

> For over 200 years, the glue that held the fabric of this society together was a common language. Thirty years ago, we began to change that. We began to deal with people in different languages. That isolated them. This bill is going to bring them back together. The isolation that was created by putting people in pockets of communities that spoke a different language kept them apart and out of the American dream. This is a modest effort to change that.

CONG. REC. (daily ed.) Aug. 1, 1996, H9737.

Rep. Solomon, Chairman of the Rules Committee, agreed: "[T]he current situation has trapped 1.5 million immigrants in poverty. . . This bill places the Federal government in the affirmative position of saying this tragedy is not going to continue." CONG. REC. (daily ed.) Aug. 1, 1996, H9731.

Rep. Livingston, Chairman of the Appropriations Committee, said:

> Opponents of making English the official language claim that certain ethnic groups do not understand English and therefore must be accommodated. . . . In 1995 alone, the Federal Government spent over $200 million on such programs. And, when you include State and local mandated spending for such programs, the amount skyrockets to $8 billion.
>
> Well, Mr. Speaker, something is obviously not working. It is becoming more and more evident that teaching children in their native, foreign language hinders their ability to learn English. Printing ballots in foreign languages does the same. Let's not perpetuate an already bad problem by officially recognizing languages other than English.

(...continued)
voting materials. *See*, H. Rep. Nos. 104-723 and 104-728, 104th Cong., 2d Sess., (1996).

CONG. REC. (daily ed.) Aug. 1, 1996, H9734.[6]

These sentiments are the same as those expressed by proponents of Article XXVIII. J.A. 28-33. They are similar to those expressed by others.[7] They amply demonstrate that

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[6]*See, also*, the remarks of Rep. Stephen Horn, long-time (1969-82) member of the United States Commission on Civil Rights:

> Ethnic groups in this country are not limited to Chinese, not limited to Hispanics, which was the original *Lau v. Nichols* case in California. In the 1970 Census there were 96 mother tongues where languages other than English were primary languages in households where many of our fellow citizens were raised; 1980, 387 non-English language possibilities. In the Los Angeles-Long Beach schools there are 70 languages. We cannot pick just one or two languages if we are really going to have equal protection of the laws.
>
> * * * *
>
> What such a policy would stop is the illusion that for every language group in a nation, a government agent must be employed or some form of government assistance must be made available to aid all members who understand English less well than their native language.

CONG. REC. (daily ed.) Aug. 1, 1996, H9766.

[7]Prof. Schlesinger writes: "Bilingualism shuts doors. It nourishes self-ghettoization and ghettoization nourishes racial antagonism." Arthur M. Schlesinger, Jr., *The Disuniting of* America, 108 (1992). The *New York Times* called bilingual education "a system that dragoons children into bilingual programs that reinforce the students' dependency on their native language and then makes escape impossible." "Bilingual Prison," *The New York Times*, September 21, 1995, at A22. The *Wall Street Journal* says "extensive bilingual ed[ucation] is extensive discrimination." "More Discrimination," *The Wall Street Journal*, February 13, 1996, A14, Col. 2. The New York City Board of Education recently concluded that new immigrants instructed in English alone performed better than students in bilingual education programs where comparatively little English is spoken. Board of Education of the City of New York, *Educational Progress of Students in Bilingual and ESL Programs: A Longitudinal Study, 1990-1994*, October 1994, ii.

The California Teachers' Association, formerly a strong advocate of bilingual education, now criticizes bilingual education for "crippling the Spanish-speaking child's educational development." *CTA Action*, May

(continued...)

Official English enactments are intended to promote non-discriminatory state interests of substantial importance to the government, such as fairness, equal treatment, adequacy of education, ameliorating poverty, self-sufficiency for all citizens, and promotion of national unity. The lower court decision, which recognized no such interests, App. 45a-56a, should be reversed.

B. The Methods to Promote These State Interests Are Policy Choices, Not Constitutional Mandates.

Government language choices, like all policy choices, should be made on the best information available, and corrected if subsequently shown to be mistaken. Bilingual ballots are a good example.

In 1975, Congress made findings about problems in voting by persons of limited English proficiency. 42 U.S.C. § 1973b(f)(1) (1994). The evidence supporting those findings was, in the words of then-Assistant Attorney General J. Stanley Pottinger, "not compelling." H. Rep. 104-728, 104th Cong., 2d Sess., 4 (1996).

Nevertheless, those findings were used to justify an extensive federal mandate that state and local governments provide multilingual voting materials. 42 U.S.C. §§ 1973aa-1a and (b)(f) (1994). The federal mandate was expensive and ineffective. The Congressional Budget Office estimated that the mandate cost state and local governments $5-10 million a year. H. Rep. 104-728, 104th Cong., 2d Sess., 10 (1996). One California county registrar spent $46,204 printing multilingual materials for the 1994 and 1996 elections, although only one person had used the materials in sixteen years. *Id.*, 7.

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[7](...continued)
1995. In November 1995, the California Board of Education abandoned California's traditional preference for bilingual education programs. CONG. REC. (daily ed.) December 5, 1995, H13932. *See also*, Amicus Brief of the Equal Opportunity Foundation in Support of Petition for Certiorari, Pp. 1-3.

More important, however, the Census Bureau's Current Population Surveys demonstrate that twenty years' of multilingual ballot materials have not boosted voting participation by members of minority language groups. Hispanic voting registration and participation markedly **decreased** between 1972 and 1992. *Id.*, 6. This ineffectiveness contrasts sharply with the success of other provisions of the Voting Rights Act in increasing voting registration and participation of African-Americans. *Id.*

The House Judiciary Committee reported: "[I]t is clear that the findings made in 1975 are no longer an accurate reflection of reality." *Id.*, 7. Therefore, the House voted three times to remove the federal mandate to provide multilingual voting materials. CONG. REC. (daily ed.) August 1, 1996, H9769, H9771, H9772.

One governmental policy, especially one which mounting evidence indicates has harmful effects, should not be frozen into place under the First Amendment. While the government may go far to remedy past harms, the First Amendment cannot be used to inflict harm in the service of "political correctness." *Hurley v. Irish-American Gay Group of Boston*, __ U.S. __, 115 S.Ct. 2338, 2350 (1995).

Yet that is what Respondents and amici are suggesting. No matter how narrowly they frame their request, they are seeking constitutional protection for a particular language choice which governments are rejecting as costly, ineffective and harmful to immigrants, children and society. The lower court decision, which prohibits governments from halting harmful activities, should be reversed.

C. Respondents and Amici Seek Unwarranted Constitutional Mandates to Maintain Languages and Cultures.

Respondents and amici apparently believe Government may choose to promote one or more languages; they just disagree

with Arizona's choice of using English. Not all immigrants or members of ethnic groups support Respondents' and amici's views.

The late Sen. S.I. Hayakawa, for example, an immigrant and reknowned semanticist, was the founder of the modern Official English movement and promoted passage of Article XXVIII. Linda Chavez, *Out of the Barrio*, 88 (1991). Chavez herself was a national leader of Hayakawa's organization. *Id.* And public opinion polls indicate that language minority groups support English as the official language. Frank Viviano, "Poll Contradicts Stereotypes," *San Francisco Chronicle*, March 28, 1990, A1 ("Among the poll's surprising findings are that Asians and Hispanics overwhelmingly favor making English the official language of California.").

Ernesto Ortiz, a ranch foreman in Texas, has said: "My children learn Spanish in school so they can grow up to be busboys and waiters. I teach them English at home so they can become lawyers and doctors." CONG. REC. (daily ed.) Aug. 1, 1996, H9762 (Remarks of Rep. Knollenberg). In New York City, Hispanic parents sued to free their children from bilingual education programs; their claim was denied because bilingual education decisions are left to the Commissioner. *The Bushwick Parents Organization v. Richard P. Mills, Cmsnr of Education of the State of New York*, S. Ct. Albany County, N.Y., (January 12, 1996) Decision and Order Index No. 5181-95, RJI No. 0195ST6061 (Teresi, J.), Slip Op. 5. Indeed, in a recent poll, 81% of Hispanic parents rejected bilingual education for their children; only 12% supported it. Equal Opportunity Foundation, *Hispanic Parents Study*, August 20, 1996, P. 49.

Respondents' and amici's concerns do not identify a **constitutional requirement** that government funds be used to preserve these cultures and languages. All parties agree that a government has the power to preserve languages and cultures. *See, e.g.*, Native American Languages Act of 1990, 25 U.S.C. § 2901, *et seq.* (1992). If a government has the power to enact

such legislation, it must have the power to preserve English as well.

This is not an area in which the Constitution[8] mandates only one result. As the Ninth Circuit said prior to the decision below: "We hold, therefore, that the Constitution neither requires nor prohibits the bilingual and bicultural education sought by the appellants. Such matters are for the people to decide." *Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978).

The *Guadalupe* holding was "disapproved" by the decision below. Pet. App. 54a n. 31 ("This court's position regarding linguistic and cultural diversity and the constitutionally-permissible means for promotion of our growth as a unified nation are the ones expressed in this majority opinion."). The lower court decision, which forbids a method of preserving English accepted by 23 states, should be reversed.

D. Official English Statutes Do Not Affect Individuals' Speech, Only Government Speech.

One of the threshold steps in any First Amendment analysis is to determine **who is speaking**. Respondents and amici claim that Article XXVIII will regulate private, legislators' or candidates' speech. The key question, however, is whether it is the **government** or an individual speaking.

Official government action is binding on the government. CONG. REC. (daily ed.) Aug. 1, 1996, H9763 (Remarks of Rep. Seastrand). Unofficial action is not binding on the government. *Id.* "This is just good common sense. It is what we would all expect for an official English bill." *Id.*, H9764. And it is what

[8]Even if there were some constitutional mandate to preserve languages and cultures, it is not likely to come from the First Amendment. "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." *Holland v. Illinois*, 493 U.S. 474, 488 (1990).

Petitioners have always maintained. Pet. App. 14a n. 12; Reply App. a8.

Private citizens and candidates cannot bind the government. Even legislators cannot separately speak for the government. Individual government employees speaking privately or informally cannot bind the government. No cause of action arises if a judge says "Mazel Tov" at a wedding, Pet. App. 23a, and the marriage doesn't work out.

If Article XXVIII only affects official acts of government, there is **no effect** on individuals,' legislators' or government employees' private or informal, nonbinding speech. Article XXVIII doesn't cover informal, non-binding "acts" of government, if there are any.

This interpretation, which obviates constitutional concerns and reflects the proponents' true intent, was rejected by the lower courts. Pet. App. 14a n. 12. The lower court decision, which ignores the court's obligation to find a constitutional interpretation if one exists, *United States v. X-Citement Video*, __ U.S. __, 115 S.Ct. 464, 467 (1994), should be reversed.

III. Neither Historical Nor International Examples Suggest Official English Enactments Violate the First Amendment.

Respondents and amici suggest that historical and international evidence indicates that Official English statutes are harmful. Their examples are neither complete nor accurate.

A. The Founders Would Not Have Permitted Unfettered Government Employee Language Choice.

Respondents and amici suggest that American history indicates that government employees and claimants for services have a right to demand multilingual government speech and services. As Petitioners showed in their Reply to Opposition to Petition for Certiorari, 6-8, such a suggestion would be contrary to the Founders' basic beliefs.

Respondents and amici suggest, for example, that the presence of large numbers of German speakers in Revolutionary-era Pennsylvania fostered a desire among the Founders to accommodate the German language in government. Yet Congress, led by Frederick Augustus Muhlenberg, a German-American from Pennsylvania, repeatedly voted **not** to provide its material in German. Amicus Brief of the Washington Legal Foundation, *et al.*, 11-13. More directly, on June 19, 1789, Benjamin Rush wrote:

> In a state where all legal proceedings as well as commerce are carried on in English, a knowledge of it must be of the utmost consequence for the preservation of property. If our Germans expected at a future day to establish their language in Pennsylvania, they never can expect to see it established in our federal councils, where they must prepare to be called to assist in the government of the United States. The English language will be absolutely necessary to qualify them for usefulness in our great national legislature.

Benj. Rush, *Letters*, (L.H. Butterfield ed.) 1:421 (1951).

B. An Official Language Policy Can Enhance, Not Undermine, National Unity.

Similarly, Respondents and amici suggest that the experience of other countries indicates that official language policies are divisive and ineffective. Their suggestions are incomplete and inaccurate.

Several amici, for example, claim that official language policies harm national unity. The evidence from overseas refutes that concern. Half the world's nations have official or designated national languages. Albert P. Blaustein and Dana Blaustein Epstein, *Resolving Language Conflicts: A Study of the World's Constitutions*, 1986. A recent article on the world's most populous country – China – credits its uniform language for several centuries of relative unity despite enormous

diversity. "The Great Chinese Puzzle: Empire of Uniformity," *Discover*, March 1996, at 76, 78. Similarly, Israel's firm language policy is credited by some with helping to insure national unity in a population constantly swollen by large numbers of immigrants. CONG. REC. (daily ed.) Aug. 1, 1996, H9751 (Remarks of Rep. Cox).

In contrast, official multilingualism is no guarantor of national unity. Only Canada officially recognizes two languages as "equally authoritative." Blaustein and Epstein, *supra*, 22. Yet, in October 1995, voters in French-speaking Quebec voted by less than one per cent to remain a part of Canada. Anne Swardson & Charles Trueheart, "Canadian Leader Offers Concessions to Quebec," *The Washington Post*, November 28, 1995, A1, col. 2. The *Parti Quebecois*, now controlling the province, may continue to move toward separation from Canada. *Id.*, A13, col 1.

IV. PETITIONERS HAVE STANDING TO REMEDY THE DIRECT AND IMMEDIATE HARM CAUSED TO THEM BY THE DECISION BELOW.

A. The State Has Not "Acquiesced" In the Lower Court Decision.

Respondents and amici suggest that Petitioners do not have standing because the **State** has "acquiesced" in the decision below. This suggestion is incorrect.

Although the Governor may have decided not to appeal, the Governor is not the State; the Arizona Attorney General, in contrast, is actively litigating in support of Article XXVIII on behalf of the State. Brief for [State] Respondents In Opposition to the Judgment ("State Resp. Br."), 36 ("The judgment of the court of appeals should be vacated and the case remanded for entry of dismissal of the Complaint.").

The State has standing to challenge the lower court decisions. *Maine v. Taylor*, 477 U.S. 131, 136 (1977). It is doing so, through the Attorney General. Now that the State has

– made its position plain, this case is no different from *U.S. Term Limits v. Thornton*, __ U.S. __, 115 S.Ct. 1842 (1995) and others in which initiative proponents were parties.

The fact that the State and Petitioners have different positions is no bar to standing.[9] Intervenors are entitled to present their strongest arguments and have all issues adjudicated. *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 766 (1989); Transcript of Argument in *U.S. Term Limits v. Thornton*, Nos. 93-1456, 93-1828, Nov. 29, 1994, 9 (QUESTION: Mr. Kester, do you adopt the same argument as your predecessor [Arkansas Attorney General] here . . . ? MR. KESTER: No, not precisely, Justice O'Connor.); *Alexander v. Hoffman*, 296 U.S. 222 (1935).

Thus, standing challenges predicated on the State having "acquiesced" in the lower court's judgment are incorrect. The validity of the lower court decision is properly at issue.

B. Petitioners Have Suffered Immediate and Direct Injury from the Decision Below.

Another claim is that Petitioners have suffered no cognizable injury because they can continue to sue in state court. This assertion is also incorrect. Petitioners participated in this case and so are bound by its constitutional adjudication. *Richards v. Jefferson County, Alabama*, __ U.S. __, 116 S.Ct. 1761, 1766 (1996); *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978).

Prior to the decisions below, Petitioners had rights to sue in state court under Article XXVIII, § 4. Now those rights are lost. As the State acknowledges, "If the Court does not vacate the Ninth Circuit decision, however, AOE's members are foreclosed from filing suit to enforce Article XXVIII under

[9]The State's position below on the merits was the same as Petitioners'. Brief of State of Arizona and State Officers, 1-14, 12 n. 4, 13 n. 5. (State concurs in Petitioners' First Amendment arguments). *Spence v. Washington*, 418 U.S. 405, 411 (1974)(when counsel changed State's position, Court looked at all arguments).

section four." State Resp. Br. 31, n. 9. Thus, Petitioners have no state court rights under Article XXVIII – solely as a result of the lower court decision.

In addition, Petitioners have suffered direct and immediate harm as a result of the adoption by the Arizona courts of the decision of the Ninth Circuit in this case. On June 11, 1996, the Arizona Court of Appeals decided *Ruiz v. Arizonans for Official English*, No. 1 CA-CV 94-0235, amended August 1, 1996, *reprinted in* Reply App.[10] "In these circumstances, we conclude that it is appropriate for us to exercise our discretion and defer to [this] federal litigation and thereby accept the construction of Article 28 and the analysis that was set forth by the Ninth Circuit." Reply App. a9.

As in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618 (1989), "as a result of the state court judgment, the case has taken on such definite shape that Petitioners are under a defined and specific legal obligation, one which causes them direct injury." Valuable legal rights – including the rights to sue and to political speech, *see* Petitioners' Opening Brief on the merits, 40-47, will be harmed to a specific and substantial degree by the judicial conclusion in this case. *Id.*, 490 U.S. at 619.

Petitioners have already tried to exercise their rights; those rights were negated by the decision below. Thus their injury is neither hypothetical nor speculative. *Whitmore v. Arkansas*, 495 U.S. 149, 156-60 (1990). It is incorrect to claim that only the State suffers an injury from the lower court decision,[11] Amicus Brief of the United States, 7, or that the judgment in

[10]*Ruiz* was a state court challenge to Article XXVIII. Pet. App. 20a (State court did not "narrow" Art. XXVIII).

[11]These statements are also incorrect because other courts are using the decisions below to expand the First Amendment. For example, in *Bernstein v. United States Dept. of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996), Judge Marilyn Hall Patel, relying on the lower court decision here, held that computer software programs are protected speech, even if they are produced and received solely by computers ("object code").

this case does not interfere with Petitioners' right to enforce Article XXVIII in state court. *Id.*, 9. Petitioners have a cognizable injury caused specifically by the lower court decision which could be redressed by the relief sought here. Petitioners have standing.

C. Respondents and Amici Misconstrue the Rights Arizona's Constitution Gives Its People.

In their Opening Brief on the merits, 41-43, Petitioners explained how the people of Arizona have legislative rights under the Arizona Constitution which deserve representation when the Governor refuses to protect them. Respondents and amici incorrectly contend that the people's only recourse is to "throw the rascals out."

In the ordinary course, "disagreement with public policy and disapproval of officials' responsiveness . . . is to be registered principally at the polls." *Minnesota*, 465 U.S. at 286. From this, Amicus United States suggests that the remedy for state officials' failure to appeal an adverse decision is recall by the voters. Amicus Brief of the United States, 24.

But the United States' own analysis suggests a less cumbersome and more direct approach, which accords more respect to the Arizona Constitution. The question of who can appeal on behalf of the State, opines the United States, "depends on how the State allocates power among its branches of government." *Id.*, 16. In States which adhere to the federal model of separation of powers, the United States suggests, a specific state law must give Petitioners standing to appeal, and Article XXVIII, § 4 is inadequate to the task. *Id.*

Yet Arizona does **not** follow the federal model of separation of powers, a fact never acknowledged by the United States[12] or

[12]Ironically, the United States recently argued that a voter initiative was "an act of the legislature." *City of Klamath Falls, Oregon v. Babbitt*, __ F. Supp. __, 1996 WL 263637, *7 (D.D.C. May 10, 1996)("In fact, it appears (continued...)

any other opponent. Arizona adds a very direct restriction on its legislative and executive branches – the power of initiative (not present in the federal model) by which the people may enact and place law beyond the power of the executive and legislative branches to alter. ARIZ. CONST. ART. IV, § 6. If, therefore, the test of power is who may create a legally-enforceable code, *Alfred A. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1986), the people of Arizona possess a fundamental power distinct from that wielded by those who do not wish to protect the people's enactment.

Both constitutionally and practically, the Arizona initiative power is a most direct method of registering disagreement and disapproval "principally at the polls." *Minnesota*, 465 U.S. at 286. Permitting the executive and legislative branches to negate this power any time they can gin up a collusive suit would encourage the most devious shenanigans.

It would be far better to recognize that the people of Arizona, faced with the failure of their Governor to protect their exercise of power, may protect themselves and their rights through an appropriate representative or "next friend." *Whitmore v. Arkansas*, 495 U.S. 149 (1990). This Court's recent decisions clearly recognize this sort of representational standing. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.* ("*UFCW*"), __ U.S. __, 116 S.Ct. 1529, 1536, (1996); *Richards v. Jefferson County, Alabama*, __ U.S. __, 116 S.Ct. 1761.

Respondents' and amici's suggestion that the Governor represent the people ignores these cases. The Governor opposed the initiative both before and after enactment, and had no role in drafting or enacting it. The Governor, therefore, would not be a "natural adversary" to challengers, *UFCW*, 116

[12](...continued)
that the Court would unconstitutionally violate the right of the people of Oregon to govern themselves if the Court determined that the initiative was not an act of the Oregon legislature. *See* U.S. Const. amend. X.").

S.Ct. at 1536, and thus would not be an appropriate representative litigant.

Petitioners, on the other hand, were an indispensable part of the process of enacting Article XXVIII, and so are the challengers' "natural adversaries" in this case. As Petitioners have demonstrated, they are prepared to fight for the people's rights, *Ruiz*, Reply App. a7 ("[Petitioner] AOE . . . was the primary litigating defendant"), a position not shared by the Governor.

This approach is compelling here, where the Attorney General **wanted** to protect the people's power when the Governor would not. J.A. 160, 179-183. The lower court negated the clear language of 28 U.S.C. § 2403(b) by a bizarre application of the doctrine of judicial estoppel, *id.*, making the State a crippled "non-party" and denying it rights guaranteed by § 2403(b) and this Court. *Maine v. Taylor*, 477 U.S. at 136 (State able to continue, after United States abandons appeal, because it will be "bound by the conclusive adjudication that its [statute] is unconstitutional.").

Petitioners have representative standing to protect the rights of the people to the fruits of their reserved power. Permitting them to do so will uphold the Arizona Constitution and the fundamental power of self-government in Arizona.

V. This Case Is Not Moot, Since There Are Live Controversies Remaining Between the Parties.

As with the other matters discussed above, despite a massive briefing, Respondents and amici (other than Respondent Arizonans Against Constitutional Tampering) overlook some important elements in their discussions of "case and controversy." Two of the four parties in this case intervened after judgment: Petitioners and Respondent AACT. Intervenors have full rights. *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993). These parties are adverse, and their claims against the other are direct and immediate. *Ruiz*. Reply

App. a6-a8. AACT is also adverse to the State since AACT wishes to affirm the lower court decisions and the State wishes to vacate and dismiss them. Similarly, there is a controversy between Petitioners and the State, which turns on the appropriate interpretation of Article XXVIII; an adjudication which adopted one interpretation over the other, or which interpreted Petitioners' right to sue the State, would alter legal rights between the two.

As to all these claims, the parties' legal rights are determined solely by the lower court decision and a change in that decision will automatically alter the legal rights of the parties. "Because reversal of the judgment of the Court of Appeals would result in the automatic reinstatement of [Petitioners' rights] the controversy before us clearly remains live notwithstanding the [Governor's] decision to abandon its own appeal." *Maine v. Taylor*, 477 U.S. at 136.

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[13]The State's attack on AACT, State's Resp. Br. 23-24, is ill-advised. The State did not oppose AACT's intervention, was not present when AACT's qualifications were presented to the lower court at argument, and ignores the extensive briefings in this case and the extensive record to which the State was privy in *Ruiz*. AACT is composed of current government employees and elected officials, some of whom provided extensive discovery to the State's attorneys in *Ruiz*. Reply App. a6-a7. The State should not suggest now that AACT's intervention motion was defective because it didn't explicitly refer to what the court and the parties already knew.

CONCLUSION

For the reasons stated here and in Petitioners' Opening Brief on the merits, the lower court should be reversed and other relief provided.

RESPECTFULLY SUBMITTED,

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No. 95-974

In The
Supreme Court of the United States
October Term 1995

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX TO REPLY BRIEF FOR PETITIONERS

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August 26, 1996

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARMANDO RUIZ, LINDA AGUIRRE, JOHN PHILIP EVANS, ROSIE GARCIA, CANDIDO MERCADO, MANUEL PENA, JR., PETER RIOS, MACARIO SALDATE IV, FEDERICO SANCHEZ and VICTOR SOLTERO,
Plaintiffs-Appellants-Cross-Appellees,
v.
ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,
Intervenors, Defendants-Appellees-Cross-Appellants.

1 CA-CV 94-0235
DEPARTMENT A
OPINION
Amended August 1, 1996

Appeal from the Superior Court of Maricopa County
Cause No. CV 92-19603
The Honorable Jeffrey S. Cates

AFFIRMED IN PART; REVERSED IN PART

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WEISBERG, Judge

Plaintiffs appeal the trial court's grant of summary judgment in favor of Defendants State of Arizona, Fife Symington III, Governor of Arizona, Grant Woods, Attorney General of Arizona, and Intervenors Arizonans for Official English and Robert D. Park (AOE). Intervenors cross-appeal the trial court's denial of their motion for attorneys' fees. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL HISTORY

In November 1988, Arizona enacted, by voter initiative, Article XXVIII (Article 28) of the Arizona Constitution:

ARTICLE XXVIII.
ENGLISH AS THE OFFICIAL LANGUAGE

1. English as the Official Language; Applicability.

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to:

(i) the legislative, executive and judicial branches of the government,

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and policies,

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this section, as appropriate to the circumstances.

2. Requiring This State to Preserve, Protect and Enhance English.

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

3. Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

4. Enforcement; Standing.

Section 4. A person who resides in or does business in this

State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

In November 1988, Maria Yniguez, a bilingual state employee who communicated in both English and Spanish while at work, filed an action in federal district court against the State, Governor, Attorney General and Director of the Department of Administration of Arizona. She sought an injunction against the enforcement of Article 28 and a declaration that it violated the First and Fourteenth Amendments of the United States Constitution and federal civil rights laws.

In January 1989, Bob Corbin, the Arizona Attorney General at that time, issued his interpretation of Article 28. He concluded that the text of Article 28 did not require a broad ban on any non-English language because the use of other languages would not be prohibited in rendering government services. Instead, he reasoned, Article 28 required only that, as the official language of Arizona, English be used to conduct the official acts of the government. Op.Atty, Gen.Az. No. I89-009 (1989).

In *Yniguez v. Mofford,* 730 F. Supp. 309 (D. Ariz. 1990), the district court disagreed with the attorney general and interpreted Article 28 to forbid all government officers and employees from using any language other than English in the course of their government duties with the exception of the limited areas set out in section 3(2). So interpreted, the district court found that Article 28 was facially overbroad and violated the First Amendment. The injunction, however, was denied since there was no enforcement action pending against Yniguez.

The Governor[1] was satisfied with the judgment and chose not to appeal to the Ninth Circuit. AOE, however, the principal sponsors of the initiative to enact Article 28, intervened as defendants so they could pursue the appeal. The Attorney General was also allowed to intervene for the limited purpose of arguing for his interpretation of Article 28 or, alternatively, for the certification of the interpretation of Article 28 to the Arizona Supreme Court pursuant to Ariz. Rev. Stat. Ann. ("A.R.S.") section 12-1861. Arizonans Against Constitutional Tampering (AACT), the principal opponents of the ballot initiative, were allowed to intervene as plaintiffs.

In *Yniguez v. Arizonans for Official English,* 69 F.3d 920 (9th Cir. 1995), the Ninth Circuit refused to certify the question to the Arizona Supreme Court, and agreed with the district court that Article 28 was facially overbroad. Shortly after the Ninth Circuit issued its opinion, AOE filed a petition for a writ of certiorari in the United States Supreme Court, which was granted. 116 S. Ct. 1316 (Mar. 26, 1996).

In November 1992, the ten plaintiffs in the instant case brought an action in superior court against the Governor and Attorney General of Arizona.[2] They sought a declaratory judgment that Article 28 violates the First, Ninth, and Fourteenth Amendments to the United States Constitution. The plaintiffs are four state elected officials, five state employees, and one private citizen. They are all bilingual and regularly communicate in both Spanish and English as private citizens and during the performance of government business. At least

[1]Prior to ruling on the merits, the district court dismissed the State and Attorney General as defendants, finding that both were protected from suit pursuant to the Eleventh Amendment. 730 F. Supp. at 311-12. The district court also dismissed the Director of the Department of Administration as a defendant, finding that, since she had not enforced or threatened to enforce Article 28, no case or controversy existed as to her. *Id.* at 313.

[2] Plaintiffs later added the State of Arizona as a defendant in their first amended complaint.

four of the plaintiffs are members of AACT, including Armando Ruiz, who is the chair of that group. AOE intervened as a defendant shortly after the complaint was filed and thereafter was the primary defending litigant.

AOE moved for summary judgment. Plaintiffs responded and filed a cross-motion. The trial court granted AOE's motion, finding that Article 28:

1. is a content-neutral regulation that does not violate the First Amendment,
2. does not violate the Equal Protection Clause of the Fourteenth Amendment because there is no proof of discriminatory intent, and
3. does not violate the Ninth Amendment because such does not protect choice of language.

AOE moved for an award of attorneys' fees pursuant to A.R.S. section 12-2030. The Court denied the motion finding that section 12-2030 did not apply since AOE had not brought the action, and it was not in the nature of a petition for writ of mandamus.

Plaintiffs now appeal arguing that Article 28 should be interpreted as a blanket prohibition against all government employees using any language other than English in the performance of any government business. As such, they reason, Article 28 is a content-based regulation of speech that is contrary to the First Amendment. Plaintiffs also argue that Article 28 constitutes intentional discrimination against non-English speaking minorities and violates the Equal Protection Clause of the Fourteenth Amendment.

AOE answers that Article 28 should be narrowly construed as requiring the use of English only for official, binding government acts. So construed, they argue, Article 28 does not violate either the First or Fourteenth Amendments. AOE also cross-appeals the denial of their attorneys' fees.

Being mindful of the *Yniguez* litigation, this court requested additional briefing from the parties on the issues of collateral

estoppel and comity.

DISCUSSION

Judicial comity is an equitable principle, not a rule of law, in which courts of one state or jurisdiction give effect to the "judicial decisions of another, not as a matter of obligation[,] but out of deference and respect." *Bobala v. Bobala,* 33 N.E.2d 845, 849 (1940). "Comity between federal and state courts is necessary to prevent . . . unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice. [It] reflects sound public policy and should be applied in a spirit of liberality." 21 C.J.S. *Courts* § 210 (1990).

Both comity and federalism concerns underlie the various federal doctrines that have developed regarding abstention, *see e.g., Webb v. Webb,* 451 U.S. 493, 499-500 (1981); *Ohio Bureau of Employment Servs. v. Hodory,* 431 U.S. 471, 477 (1977), and the less cumbersome alternative of certification, *see Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 396 (1988); *Bellotti v. Baird*, 428 U.S. 132, 146-48 (1976). In *Yniguez*, the Ninth Circuit refused to abstain and certify the question of Article 28's proper interpretation to the Arizona Supreme Court, although the issue was pending in our state court system. The court found that abstention was inappropriate because the case involved a First Amendment challenge and because Article 28 was not obviously susceptible to a limiting construction. 69 F.3d at 930-31; *cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 507-10 (1985) (O'Connor, J. concurring); *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987).

This court is now placed in the difficult position of deciding whether to reach the merits of this case or whether to defer to the pending federal adjudication. Comity, in the context of federal-state relations, more typically applies when a federal court finds that deference to a state court, on an issue of state law, is proper. States, however, should also defer, when appropriate, to federal courts. In *Bouwman v. Dep't of Social*

Servs., 375 N.W.2d 806, 808 (Mich. App. 1985), a state court held that principles of comity required it to defer to a federal court decision concerning the interpretation and constitutionality of a state social services regulation. *See also Hall v. Nomura Sec. Int'l*, 268 Cal. Rptr. 45, 49 (App. 1990) (while lower federal court decisions are not binding, they are entitled to great weight); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (judicial comity affording deference to federal court decisions ensures uniformity of law and discourages forum shopping); *Van de Hav v. United States Nat'l Bank*, 793 P.2d 1388, 1390 (App. 1990) (noting the "practical advantages" of adopting the same statutory interpretation as a federal court), *aff'd on other grounds*, 829 P.2d 695 (Or. 1992).

In these circumstances, we conclude that it is appropriate for us to exercise our discretion and defer to the federal litigation and thereby accept the construction of Article 28 and the analysis that was set forth by the Ninth Circuit. Such deference promotes uniformity in interpretation of the law and discourages the parties from forum shopping. Further, the United States Supreme Court may choose to address the constitutionality of Article 28 and put both *Yniguez* and the instant case to rest.

We affirm the trial court's denial of AOE's attorneys' fees.

CONCLUSION

We exercise our discretion and accept the opinion of the Ninth Circuit. The judgment of the trial court is reversed as to Article 28 and affirmed as to the denial of AOE's attorneys' fees.

Sheldon H. Weisberg, Presiding Judge

CONCURRING:
Philip E. Toci, Judge
William F. Garbarino, Judge